24-849

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

MATHEW JAMES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

The deliberating jury requested several transcripts of highly prejudicial unadmitted calls that one or more jurors reviewed and likely discussed with other jurors. The government successfully objected to any inquiry, even though an inquiry is standard operating procedure when jurors are exposed to outside matter, including during deliberations. The result is that the parties and now this Court are in the dark about the basic facts.

The government's brief doubles down on the errors below. It argues that any inquiry would have violated the integrity of deliberations. But it fails to cite a single case in which a conviction has been affirmed following jury exposure to extra-record material absent an inquiry by the judge. It also confuses the rules applicable during post-verdict inquiries with those applicable during trial and deliberations. It even argues the damaging transcripts may have been helpful to the defense. But because the court drew a veil over the incident, we do not even know which transcripts the jury saw. Given the presumption of prejudice that applies to jury exposure to extra-record matter, this Court must remand for a new trial.

Even if this Court does not vacate the convictions, it must vacate James's illegal sentence and the unreasoned but gargantuan forfeiture and restitution awards. The government has no serious response on these points other than to distort the law and the record below.

ARGUMENT

I. THE DISTRICT COURT FAILED TO ADDRESS THE JURY'S EXPOSURE TO HIGHLY DAMAGING EXTRINSIC MATERIAL

The government does not dispute that one or more jurors were exposed to the transcripts of one and maybe two unadmitted calls between James and an employee. These calls were recorded shortly after the FBI raid on James's office and were highly damaging to the defense. Beyond this, everything else is unknown: Was the jury exposed to GX1a or GX2a, or both? Was it exposed to a third transcript, GX3a, to which one of the jury notes appears to refer? Was the issue confined to one juror, or were multiple jurors exposed? How extensively did the jury discuss the issue? Were jurors able to put the transcripts out of their minds and remain fair and impartial?

These unanswered—and now unanswerable—questions are why it is standard procedure for courts to respond to jury contamination by making a careful and limited inquiry. The government has not identified a single case affirming a conviction obtained following jury exposure to extra-record material in which the trial court—as here—refused to make *any* inquiry into the incident. The government objected to any inquiry, claiming it would invade the province of the jury. (A-399, 402-09). It led the trial court into an error that deprived James of a fair trial and now requires vacatur of his convictions.

1. Because the trial court's deviation from standard procedure is so clear, the government resorts to outright distortion of the precedent. The government misleadingly claims that "after deliberations have begun [the trial court] 'may not inquire into the degree upon which the extra-record information was used in deliberations and the impression which jurors actually had of it.'" (G.Br.20). But the case the government quotes, *United States v. Greer*, 285 F.3d 158 (2d Cir. 2002), involved a *post-verdict* inquiry, and says nothing about inquiries made *during deliberations*.[1]

Greer held that Rule 606(b), which applies following a verdict, bars a court from asking jurors "whether the extra-record information impacted their ability to be fair and impartial." 285 F.3d at 173-04. "Because [*Greer* involved] a post-verdict hearing, that line of questioning was improper." *Id.* Similarly, in *United States v. Calbas*, the Court held that "the only fact-finding which is germane *after* a verdict has been rendered is a determination of the precise nature of the [extra-record] information proffered and the degree, if any, to which that information was actually discussed or considered." 821 F.2d 887, 896-97 (2d Cir. 1987) (emphasis original).

[1] Unless otherwise noted, citations omit internal quotation marks, footnotes, and previous alterations, and emphasis in the original source.

Before verdict, the situation is fundamentally different. In case after case—including several cases cited by the government—this Court has approved of trial courts inquiring both into the scope of the exposure and the effect of the exposure on the jury's ability to judge the case fairly.

In *United States v. Chang An-Lo*, the trial court, on learning that deliberating jurors had been exposed to an extra-record news article, "called the two affected jurors into his robing room and questioned them individually." 851 F.2d 547, 559 (2d Cir. 1988) (cited G.Br.19-20). The judge "asked [the first juror] about the article and its contents, and its effect upon his judgment." *Id.* The juror "claimed that the article would not affect his impartiality, and [the judge] concluded…the article was innocuous after reviewing it." *Id.* "The judge was also satisfied, after speaking with [the second juror], that the other jurors had not seen the article." *Id.* This Court approved the judge's "face-to-face assessment of the jurors' demeanor and credibility," and his decision to permit deliberations to continue. *Id.*

Similarly, in *United States v. Farhane*, a deliberating juror uncovered a codefendant's guilty plea. 634 F.3d 127, 168 (2d Cir. 2011) (cited G.Br.23-25). In addition to giving remedial instructions, the trial court questioned the juror and asked her whether "anything would prevent her from being fair and impartial" and whether she could "follow the court's instruction to judge the case solely on the basis of the trial evidence." *Id.* at 169. This Court again affirmed. *Id.* at 169-70.

Other cases involved similar inquiries. *See, e.g.*, *United States v. Casamento*, 887 F.2d 1141, 1186-87 (2d Cir. 1989) (judge questioned deliberating juror about whether threat "affected you as a juror"); *United States v. Peterson*, 385 F.3d 127, 131-37 (2d Cir. 2004) (judge questioned tainted juror in chambers and asked remaining jurors whether they could remain fair and impartial).

There is nothing improper about such inquiries. To the contrary, they are a standard part of the trial judge's toolkit, one the trial judge should have used here.

The government's reliance on *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997) for the proposition that any inquiry would have "infringed on the integrity of jury deliberations" (G.Br.23) is misplaced. *Thomas* limits the circumstances in which a court may inquire into a juror's alleged refusal to follow the court's instructions on the law, *i.e.*, nullification. *Id.* at 614-24. But *Thomas* recognized that nullification is different from extra-record influence and calls for a different response. *Id.* at 621. In the latter situation, a limited inquiry into the facts and their effects on a deliberating juror will often guide the court to the correct remedy. *Id.* Indeed, *Thomas* specifically approved the procedure used in *United States v. Badalamenti*, 663 F. Supp. 1539, 1540-41 (S.D.N.Y. 1987), *aff'd sub. nom. Casamento*, 887 F.2d at 1186-87, in which Judge Leval questioned a deliberating juror about a threatening communication and weighed the juror's assurance that she could judge the case fairly. *Id.*

2. The trial court's failure to take standard steps to discover the facts leaves the parties and the courts ignorant. The government breezily dismisses the jury's "fleeting potential exposure to the transcripts." (G.Br.27). But neither the government nor James knows whether the exposure was "fleeting" or more substantive. (A-400). What we do know is that one or more jurors reviewed one or more transcripts with sufficient interest to raise them in deliberations and describe them in multiple jury notes. We do not know exactly which transcripts were reviewed. We do not know which jurors were exposed to them. We do not know how long the jury discussed the transcripts.

These are crucial questions. "[A]ny extra-record information of which a juror becomes aware is presumed prejudicial." *Greer*, 285 F.3d at 173. In cases of contamination, "the trial court should assess the possibility of prejudice by reviewing the entire record, *analyzing the substance of the extrinsic evidence*, and comparing it to that information of which the jurors were properly aware." *United States v. Weiss*, 752 F.2d 777, 783 (2d Cir. 1985) (emphasis added). In *Weiss*, for example, this Court found no abuse of discretion where the judge conducted an "exhaustive" post-verdict hearing, questioned ten jurors, and identified the portion of an extra-record book that jurors discussed. *Id.* at 782-83. In *Chang An-Lo*, this Court found no abuse of discretion where the judge reviewed the extra-record news article and concluded it was innocuous. 851 F.2d at 559. By refusing to make

even a basic inquiry into what was reviewed by whom, the trial court did not equip itself, the parties, or this Court, to conduct this task.

The government's insistence that the undeniably inflammatory GX3a was never in the jury's binders illustrates the point. (G.Br.21 n.6). The jury asked for "call exhibits 1, 2 and 3." (A-509). Beyond the prosecutor's representations, there is no evidence that GX3a was not in the jury's binders. Nor did "defense counsel agree[] that [GX3a] was never in the binder." (G.Br.21). Rather, defense counsel said he "t[ook] [the prosecutors] at their word" regarding GX3a but immediately renewed his request for an inquiry because "a juror…could have seen that exhibit" and "we remain concerned and we think there is a reason why [the jury note] refers to Exhibits 1, 2, and 3." (A-395). The court itself believed that GX3a may have been among the materials requested. (A-409-10). The court should have gotten to the bottom of the matter by calling the relevant jurors into chambers and asking basic questions.

3. The government's argument that GX1a and GX2a were "duplicative of evidence admitted at trial and were in fact helpful to James" (G.Br.25-26) is myopic. James's admissions that "one thing I did wrong was impersonating patients" and that "since March we haven't done anything wrong" (A-441, 446) would have severely undermined James's good faith defense and were not duplicative of any other evidence. The government argues that GX1a and GX2a

were "duplicative" because other evidence, including a stipulation, proved that James impersonated patients. (G.Br.26). But the issue is not whether James impersonated patients as a matter of fact (the *actus reus*) but whether he did so in bad faith (the *mens rea*). Because James's defense was good faith, this was *the* question.

Nor were GX1a and GX2a "helpful" to the defense. (G.Br.25-26). Given the strategic choice to focus on good faith, no defense lawyer would have wanted the jury exposed to transcripts containing admissions that James knew his conduct was "wrong." Moreover, contrary to the government's suggestion that James was "comfort[ing]" his employee (G.Br.26), a plausible reading is that James was prying into his employee's conversations with the FBI while keeping her onside and obstructively suggesting that she tell the FBI "the truth" about his "legitimate business." (Br.16, 23-24; A-396-97).

Of course, the government cannot argue that the jury's exposure to GX3a—in which a former employee reports James for "fraud" and calls him "disgusting" and the "worst person ever"—would have been harmless. (Br.24). This call was so damaging that James declined to cross-question the employee for fear of opening the door to the call's admission, a point the government hammered in summation. (A-235-37, 317).

4. This leaves the government to argue that juries are generally "presumed to follow the court's instructions." (G.Br.22-23). But "limiting instructions cannot be regarded as a guaranty against prejudice." *United States v. Curley*, 639 F.3d 50, 60 (2d Cir. 2011). In *United States v. Schwarz*, for example, the jury "had been repeatedly admonished…to ignore extrinsic information"; this Court still granted a new trial. 283 F.3d 76, 89, 97-100 (2d Cir. 2002). Here, the record does not contain enough information to enable a determination that a remedial instruction would overcome the presumption of prejudice. This is why, in every case in which convictions have been affirmed following the infiltration of extra-record matter, the trial court conducted some form of inquiry to determine the extent of the problem.

The trial court's instruction was also hopelessly garbled. The court told jurors who "think they have seen something" that they were "mistaken," that the transcripts were "not in evidence," and that jurors should "treat *this statement* as you would any other item of evidence that I have told you is not in evidence, is not for your consideration." (A-409-10). What jurors made of this "don't believe your eyes but disregard what you've seen" jumble is anyone's guess.

That the jury returned a verdict "shortly after receiving this instruction" does not show that the instruction cured the prejudice. (G.Br.23). Rather, it indicates that the transcripts were on the jury's mind around the time it decided the case.

This contrasts with a case such as *Weiss*, where the court's thorough investigation revealed that "after the [extra-record matter] was brought up in the discussion, the jury moved on to other matters." 752 F.2d at 782.

5. The government does not dispute that no purpose would be served by remanding for a hearing given that more than two years have now passed since James's trial. (*See* Br.25-26). Accordingly, a new trial is the only feasible remedy.

II. THE DISTRICT COURT MISCALCULATED THE SENTENCING GUIDELINES

A. The Abuse Of Trust Enhancement Does Not Apply

James's case is almost paradigmatically *unsuitable* for application of the abuse of trust enhancement.

To begin, the insurers conferred no fiduciary-like discretion on James. The government argues that the abuse of trust enhancement "does not require 'a legally defined duty such as a fiduciary duty.'" (G.Br.40 (quoting *United States v. Thorn*, 317 F.3d 107, 120 (2d Cir. 2003))). But although a formal fiduciary relationship is not required, this Court has repeatedly held that "an abuse of trust enhancement *must involve* a *fiduciary-like relationship* that goes beyond 'simply the reliance of the victim on the misleading statements or conduct of the defendant.'" *United States v. Huggins*, 844 F.3d 118, 125 (2d Cir. 2016) (emphasis added) (quoting *United States v. Ntshona*, 156 F.3d 318, 320 (2d Cir. 1998) (quoting *United States v. Jolly*, 102 F.3d 46, 49 (2d Cir. 1996))). This makes sense because "in the typical

case…the victim is a business and the defendant is an employee." *Jolly*, 102 F.3d at 49-50 (quoting *United States v. Brunson*, 54 F.3d 673 (10th Cir. 1995)). Most employees are not formally fiduciaries, but may well have "fiduciary-like" obligations.

Such a quasi-fiduciary relationship was present in *every case* the government cites where the abuse of trust enhancement was affirmed. In *United States v. Allen*, the defendant was an office manager who used her authority over the business's banking, budgets, and payroll to embezzle funds. 201 F.3d 163, 165-67 (2d Cir. 2000) (cited G.Br.40). This was "a classic case for application of an abuse of trust enhancement." *Id.* at 167. In *United States v. Castagnet*, the defendant was a former employee who used his access and knowledge of an airline's electronic codes to print free tickets. 936 F.3d 57, 58 (2d Cir. 1991) (cited G.Br.40). In *United States v. Alston*, the defendant was a police officer convicted in a drug distribution conspiracy. 899 F.3d 135, 139 (2d Cir. 2018) (cited G.Br.39). "[F]rom the perspective of society" he held "a position of trust" for "detecting and preventing crime." *Id.* at 151. In *Ntshona*, the physician defendant was an *actual* fiduciary. 156 F.3d at 321 (cited G.Br.43). The examples given in the application note are similar—"an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician." USSG § 3B1.3, cmt. n.1.

The insurance companies did not enter a "fiduciary-like relationship" with James. James was not an employee, agent, or advisor, or even in a contractual relationship with the insurers. This alone bars application of the enhancement.

Equally fatal to the government's argument is its concession that the insurance companies could and did audit claims by "request[ing] medical records and [making] payment decisions based on those records." (G.Br.41). On this point, *Thorn* (cited G.Br.40), is instructive. Thorn owned an asbestos abatement business shot through with fraud. 317 F.3d at 111-14. The government argued that the abuse of trust enhancement applied because regulations largely barred Thorn's clients from being present during abatement and thus clients were "forced…to trust…Thorn's certifications." *Id.* at 121.

This Court rejected that argument. Thorn's "clients theoretically retained the ability to oversee Thorn's work…even if such oversight was more complicated due to regulations restricting access to the site or the regulatory and scientific complexity of the project." *Id.* at 121-22. Thorn also sent his clients "clearances" on completing the project, suggesting that clients "did not blindly trust him but rather expected him to present proof" of compliance. *Id.* at 122. In other words, Thorn's clients did not "[give] Thorn discretion" but instead required him to comply with regulations and understood he would certify that he had done so. *Id.* at 121-22.

Here, as the government concedes, insurance companies could and did conduct audits. (G.Br.41). Indeed, it was central to the government's case that insurance companies "[f]requently…balked at paying a patient's fraudulently inflated claim." (G.Br.11). The government also does not dispute that James always submitted the underlying medical records provided to him by doctors. (Br.8-9). As in *Thorn*, the insurance companies "did not blindly trust [James] but rather expected him to present proof." 317 F.3d at 122. When they were not satisfied, they did not pay. James manifestly did not occupy a "position of trust."

Contrary to the government's misleading claim, there is *no precedent* applying the abuse of trust enhancement to a medical biller. The government argues that "James is no different from any other medical biller or provider who has been found to abuse a position of trust." (G.Br.43). But, as the government conceded below, it "has not identified a court decision specifically involving a medical biller." (Dkt.245 at 23). The government's brief does not cite a single case involving a medical biller.

Instead, the government cites *Ntshona*, which held that "*a doctor* convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to" the abuse of trust enhancement. 156 F.3d at 321 (emphasis original). Medical billers

like James have no similar fiduciary-like relationship with either patients or insurers. (Br.30-31).

The government's alternative argument also fails. It argues that that James's "use without authority [of] [a] means of identification" to carry out the fraud is "an independent basis to affirm" the abuse of trust enhancement. (G.Br.44 (citing USSG § 3B1.3, cmt. n.2(B))). This argument is so clearly wrong the government did not even make it below. The aggravated identity theft guideline, USSG § 2B1.6, contains a "special guidelines rule against double counting" that bars the use of a further identity theft-based enhancement in addition to the mandatory consecutive two-year term. *United States v. Zheng*, 762 F.3d 605, 608 (7th Cir. 2014). Under this guideline, a court imposing an aggravated identity theft sentence "in conjunction with a sentence for an underlying offense" must *not* "apply any specific offense characteristic for the…use of a means of identification when determining the sentence for the underlying offense." USSG § 2B1.6, cmt. n.2. This "special rule" is directly on point, and dispositive. *See Zheng*, 762 F.3d at 611 (vacating sentence); *see also United States v. Taylor*, 374 F. App'x 392, 393 (4th Cir. 2010) (government conceded double counting was plain error).

Moreover, the district court did not make findings that would satisfy either USSG § 3B1.3 generally or application note 2(B) specifically. Instead, the district court merely stated it had "discussed this in detail with the probation officer…and

while it's a close call…he was in a position of trust. He had individuals' personal information in terms of their health, their status, all sorts of things." (A-619). The application of the enhancement cannot be affirmed on such conclusory findings. *See United States v. Goykhman*, 142 F. App'x 487, 489 (2005).

Finally, the government incorrectly claims that the standard of review is clear error. (G.Br.45 ("the court did not err, much less clearly err")). The standard of review on the first prong of the two-part test—whether James occupied a position of trust—is *de novo*. *See United States v. Hirsch,* 239 F.3d 221, 227 (2d Cir. 2001); *Thorn*, 317 F.3d at 120. That is the prong at issue here.

B. The District Court Failed To Make The Required Specific Findings In Open Court As To The Leadership Enhancement

The district court applied the four-level leadership enhancement without any analysis or finding and without adopting the PSR in open court. This alone requires a remand for resentencing. *See United States v. Carter*, 489 F.3d 528, 540 (2d Cir. 2007).

The government's response is to ignore the issue. It spends six pages arguing that there was ample evidence on which the district court could have relied. (G.Br.32-38). It claims that "[g]iven how apparent the specific facts…are in the record" there is no basis for James to challenge the enhancement. (*Id.* at 38). It also points to the perfunctory analysis in the Second Addendum to the PSR. (*Id.* at 37). But it does not claim that the district court adopted the PSR in open court.

And it gives not a sideways glance to the binding precedent cited in James's brief holding that findings in the PSR may suffice only if the court expressly adopts those findings in open court. (Br.34). Indeed, the *only* cases the government cites for its "look at the PSR" argument are cases in which the district court expressly adopted the PSR at sentencing. In *United States v. Napoli*, "the district court adopted the factual findings of the PSR" both "in its written opinion and at sentencing." 179 F.3d 1, 5-6 (2d Cir. 1999) (cited G.Br.38). In *United States v. Rainford*, the district court similarly "adopted the facts in the PSRs." 110 F.4th 455, 477 (2d Cir. 2024) (cited G.Br.38).[2]

Even if the court could rely on the PSR, the government's argument regarding the conclusory findings in the PSR would fail. (G.Br.37). The PSR relied solely on the "five criminally responsible participants" prong of the leadership enhancement, ignoring the "otherwise extensive" prong the government now emphasizes. But it did not identify who the criminally responsible participants were, nor did it address the factors mandated by application note 4 to USSG § 3B1.1. In *Carter*, this Court vacated a sentence on plain error review where the PSR "made reference to [a witness's] testimony that [the defendant]

[2] This Court's opinion in *Rainford* does not make clear *when* the district court adopted the PSR, but the government's brief in *Rainford* does. *See* Brief for the United States, *United States v. Rainford*, Second Circuit, No. 20-359, 2022 WL 17413945, at *63 ("The District Court adopted the Presentence Report's specific factual findings at Duncan's sentencing.").

supplied drugs to at least 10 dealers" and failed to "demonstrate consideration of the various factors laid out" in caselaw and application note 4. 489 F.3d at 540. The PSR's findings in this case are no more specific.

C. The Guidelines Errors Require Resentencing

This Court has recognized the "powerful anchoring effect of a miscalculated Guidelines range" and the usual remedy when the sentencing court miscalculates the guidelines is to vacate and remand for resentencing. *United States v. Seabrook*, 968 F.3d 224, 234 (2d Cir. 2020). The government makes only the most perfunctory argument that the guidelines errors do not require a new sentencing. (G.Br.28-30). It concedes that, in addition to the two-level abuse of trust enhancement and the four-level leadership enhancement, the court's error with respect to the leadership enhancement deprived James of the two-level zero-point offender reduction. (G.Br.29). It further concedes that in any scenario in which the leadership enhancement was not imposed his guidelines would be lower—and probably significantly lower—than the sentence imposed. (G.Br.29 n.7).

III. THE DISTRICT COURT UNLAWFULLY ADDED TWO YEARS TO THE SENTENCE TO NEGATE THE POSSIBILITY OF EARLY RELEASE UNDER THE FIRST STEP ACT AND RDAP

In its zeal for the longest possible sentence, the prosecution argued that James should receive a longer sentence because he might be eligible for early release using First Step Act earned credits and/or RDAP. The government even

told the district court it could sentence James on the assumption he would achieve early release and then grant compassionate release if he didn't. (Dkt.259 at 10). The district court responded to this unusual advocacy by lengthening James's sentence by two years. The resulting sentence was unlawful, and this Court must vacate.

The government has now abandoned the false claim it made in the district court that James could cut his sentence *in half* through earned time credits and participation in other programs. The government first made this claim in its sentencing memorandum and returned to it repeatedly at the first sentencing proceeding. (Dkt.245 at 34 n.13; A-693, 696). James's opening brief showed it was simply untrue—James might earn some reduction, but nowhere near 50%. (Br.39). The government does not contest this. It therefore admits the error.

But the fiction of a 50% reduction in James's sentence drove the court's thinking. Even at the second hearing, after the defense explained in writing why the government's claim was false (Dkt.257 at 3-5), the district court continued to believe "there are a variety of ways that you may come up with half the sentence." (A-724). The district court chose its sentence based on an incorrect understanding of the applicable law. This alone requires remand for a new sentencing.

The record also belies the government's claim that the extended sentence was based on a variety of factors and that early release was not the sole criteria

driving the decision. (G.Br.48-49). The government quotes extensively from the second sentencing proceeding, where the district court insisted that early release was not its "sole consideration" and that there were "a whole variety of reasons" for the extended sentence. (*Id.*). The court made these assertions after being presented with authority prohibiting consideration of good time credits as a "standalone" factor. (Dkt.259 at 6; *see also* A-723). But the true basis for the district court's decision is shown by what it said when adjourning the first sentencing hearing: "I was intending to give him ten years, but that was based on the court's misunderstanding of the ability of the defendant to engage in programs and potentially halve his sentence. *That's why I changed my initial determination*." (A-702-03).

The government also implies that the first sentencing hearing was merely a preliminary proceeding at which the district court addressed objections to the PSR, guidelines, forfeiture, and restitution. (G.Br.17-18). The suggestion is that the district court had not decided a sentence and always contemplated a second hearing to impose judgment. This is false. The first sentencing hearing was a full sentencing, at which the court addressed objections, heard from James, from James's daughter, and from the victims. (A-549-711). It then addressed the § 3553(a) factors and began imposing sentence—"at 56 a sentence of ten years is a

substantial one" (A-691)—before being interrupted by the prosecutor (A-692) and persuaded to change its mind.

The government's reliance on out-of-circuit cases holding that a sentencing court may consider the availability of good time credits as one factor among several is misplaced. (G.Br.46-47, 50). The government does not deny that earned time credits under the First Step Act are different from and far less certain than good time credits. (Br.41-42). Nor does the government cite any case suggesting that a court may consider earned time credits when fashioning a sentence.

The government does not even attempt to defend the district court's indefensible reliance on James's anticipated eligibility for RDAP as a ground for extending James's sentence. (Br.42). RDAP eligibility requires self-disclosure of substance or alcohol abuse during the pre-sentence investigation. It is manifestly contrary to good policy to permit such disclosures to drive a longer sentence. Indeed, if James's sentence is affirmed, defendants may be reluctant to disclose a substance abuse problem for fear it could lead to a longer sentence. This cannot be right.

The government's reliance on authorities holding that the sentencing court may consider a wide variety of information *about the defendant* is also unavailing. (G.Br.45-46). The relevant statute clears away most limitations "on the information concerning the *background, character, and conduct of a person*

convicted of an offense" that may be considered at sentencing. 18 U.S.C. § 3661 (emphasis added). *Pepper v. United States* similarly holds that courts should "consider the widest possible breadth of information *about a defendant*." 562 U.S. 476, 488 (2011) (emphasis added).

But the district court here didn't consider information about the defendant's "background, character, and conduct." 18 U.S.C. § 3661. Instead, it speculated (incorrectly) about the date James might get out of prison based on matters that are wholly within BOP's authority and discretion. As the prosecutor noted, James "doesn't immediately qualify for RDAP," "has to be able to be placed" in a suitable institution, and "if he's eligible for RDAP, they don't even place them until 48 months or less" prior to release. (A-741). Because the BOP, and not the court, has plenary authority over James's participation in First Step Act classes and RDAP, the court lacked authority to consider these factors when crafting a sentence.

On this point, *Tapia v. United States*, 564 U.S. 319 (2011) (cited Br.42) is all but dispositive. *Tapia* held that "[i]f Congress had…meant to allow courts to base prison terms on offenders' rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs." *Id.* at 330-31. But courts lack this authority. *Id.* at 331. "That incapacity…indicates that Congress did not intend that courts consider offenders' rehabilitative needs when imposing prison sentences." *Id.*

What was true in *Tapia* is also true here. The sentencing court did not have the power to order the BOP to permit James or any other defendant to participate in RDAP or in classes eligible for earned time credits. It should not have considered those programs when imposing sentence.

IV. THE DISTRICT COURT MISCALCULATED FORFEITURE

Without any reasoning, and despite acknowledging that not all James's claims were fraudulent, the district court picked James's total business revenues of $63 million as the measure of forfeiture. The government's attempt to prop up the district court's forfeiture decision is deeply misleading.

The government falsely asserts that "[n]early every claim submitted to the insurance companies contained false information." (G.Br.53). The government has no basis for this assertion, and none of the record citations that follow support it. Rather, the government points to particular instances of the alleged fraud and to James's instructions that his employees take particular allegedly fraudulent actions in certain situations. For example, the government points to evidence that several patients were impersonated. (G.Br.54). But this doesn't show that all patients were impersonated, or that all claims associated with patients who were impersonated were fraudulent—as discussed *infra*, pp. 24-25, they were not. The government similarly points to evidence that James told employees to upcode "if" the medical records were "vague" or "unclear." (*E.g.*, A-210-11). None of this

supports the assertion that "every claim" contained false information, or even that most claims did. To the contrary, it indicates that James told employees only to upcode in certain situations.

Also false is the government's claim that its "forensic accountant" "traced" $63,382,049 in "illegal proceeds" into James's bank accounts. (G.Br.54). The accountant merely tabulated James's total business revenues. The accountant acknowledged that he did not know "whether one dollar" of those revenues was fraudulent. (A-271).

The government also points to conclusory testimony from the case agent that James was "running a fraudulent business" and that every dollar received from every doctor was considered fraudulent. (G.Br.54-55). But the case agent's overall view of the scope and extent of James's criminality is irrelevant—what matters is whether there is evidence to back up that view. Here there was not. Indeed, the case agent's conclusion was severely undercut by his own affidavit, submitted a year into the investigation, which described James's fraudulent billing as a "subset" of the total claims. (A-240).

The government's reliance on *United States v. Bikundi*, 926 F.3d 761 (D.C. Cir. 2019), and *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), is misplaced. (G.Br.55). In *Bikundi*, the district court made an express finding that the defendants' business "would not have operated *but for* each defendant's fraud"

and that the forfeited revenue "was *only* paid due to the defendants' persistent and rampant fraudulent conduct." 926 F.3d at 793 (emphasis original). No such findings were made here, nor would such finding have been supportable. Similarly, in *Warshack*, the district court expressly concluded that "the entire operation was permeated with fraud." 631 F.3d at 332. *Warshack* also involved specific evidence that even certain arguably legitimate sales were the "outgrowth" of the fraud, including because the business "would have been unable to conduct credit-card transactions" if the fraud had never occurred. *Id.* at 332-33. There is no such evidence in this case.

The government also chides James for his "failure to identify any allegedly legitimate claims." (G.Br.55). But it was the government's burden to prove both its entitlement to *and* the correct measure of forfeiture. *United States v. Roberts*, 660 F.3d 149, 165 (2d Cir. 2011). The government did not meet that burden here.

In any event, James *did* identify legitimate claims, none of which the government addresses. (Br.8-9). For example, James submitted claims on behalf of a sleep study doctor for years, none of which raised any red flags. (A-254-56, 788-92). For this, and other proper claims (*e.g*, A-794-97), while the case agent was unable to "confirm" the absence of improper billing, he acknowledged that they involved no improper modifiers and no codes involved in the charged fraud. The court stated it would "make a finding that not all of the claims were false,

fraudulent" and observed "[t]here were some [claims]…that were legitimate." (A-590, 605).

Contrary to the government's citation-free assertion, the court did not "reject[] James's unsupported 'expert' report." (G.Br.57). Rather, the court rejected the government's spurious objections to the expert, finding that she had "years of experience in coding and healthcare" and that "her report has some weight." (A-604). The expert opined that 20% of James's revenue from the patients who testified at trial was attributable to allegedly fraudulent coding. (A-538-39). The court never questioned this opinion. Indeed, in a different section of its brief, the government allows that the court "partially credit[ed]" the defense expert. (G.Br.76). The government presented no expert of its own.

Because the court made no findings and gave no explanation, the government is left arguing that the forfeiture decision was—in so many words—"good enough." (*See* G.Br.52-53, 58-59). But preponderance of the evidence is not the same thing as flipping a coin. The trial court may "use general points of reference as a starting point" and "make reasonable extrapolations." *Roberts*, 660 F.3d at 166. But that is not what happened here. The district court picked a reference point (James's total business revenues) but then refused to make a "reasonable extrapolation" (reducing for untainted revenues).

When sentencing courts have erred in this way, this Court has vacated. In *Roberts*, the "starting point" (the amount of drugs) was unproblematic but the district court "did not state its reasons for employing a retail rather than wholesale multiplier" when extrapolating to determine the conspiracy's proceeds. 660 F.3d at 167-68. Reviewing only for plain error, the Court vacated and remanded for clarification and further factfinding. *Id.* at 168. Similarly, in *United States v. Treacy*, the parties disputed the "measurement dates" for stock options involved in a fraud. 639 F.3d 32, 48-50 (2d Cir. 2011) (cited G.Br.53, 58). This Court found that the trial court had used the wrong measurement date for one set of options, resulting in an excessive forfeiture. *Id.*

The district court failed to conduct any real analysis on forfeiture and made no relevant findings. The forfeiture order should be vacated.

V. THE DISTRICT COURT MISCALCULATED RESTITUTION

The government's attempt to defend the district court's mammoth restitution award is even more misleading than its forfeiture argument. The government persuaded the district court to rubber stamp its vastly inflated restitution amount and apparently hopes this Court will similarly throw up its hands.

The government's restitution application consisted of two vast spreadsheets that added up all moneys paid out on claims involving Modifier 59 or for patients who were impersonated. The problem with this approach was self-evident. Not

every use of Modifier 59 was improper or resulted in an illegal payment. As for impersonations, the fact that James impersonated a patient with respect to one claim does not mean that other claims for that patient were fraudulent or that money paid out prior to the impersonation was tainted. But the government made no distinction between these different situations, even though it was plainly capable of teasing out, for example, those payments that resulted from impersonation and those that did not. (*E.g.*, G.Br.69-71).

The government does not deny any of this. Instead, it attempts to mislead the Court and create distraction.

The government creates the false impression that James's impersonations resulted in balance payments for three patients—Guzman, Smart, and Rhodes—that dwarfed the amounts initially paid out. (G.Br.69-70). As to Smart, for example, the government writes that "[t]he insurance company paid $96,468.50 out of $265,800 billed in claims for Smart; James impersonated Smart to collect the balance." (*Id.*). The suggestion is that the impersonation of Smart *resulted in* a payment of $169,331.50. This isn't true, and the government's spreadsheet doesn't support it. The same applies to Guzman and Rhodes: the impersonations were unsuccessful and did not result in further payments. None of the payments associated with these witnesses were losses caused by the fraud and none should have counted towards restitution.

Even if balance payments had resulted from these impersonations, that would not have made the government's restitution calculation a reasonable approximation of the insurers' losses. For example, in the case of Smart, the pre-impersonation payments were *one third* of the total billed. That's a substantial error.

To be clear, James is not arguing that the impersonations were always unsuccessful or that payments following impersonations were not sometimes much larger than payments made before the impersonations. (G.Br.69). For example, in the case of Sonia Hawkins, payments were made before the impersonation and after the impersonation, and the latter payments were far larger. (G.Br.70). But payments made prior to the impersonations did not result from the impersonations and should not have been included in the restitution amount.

Moreover, some patients had multiple claims related to multiple dates of service. Sometimes James impersonated with respect to some claims but not others. In Hawkins's case, there was a June 2016 date of service unaffected by impersonation, and a May 2017 date of service that was affected by impersonation. (SA-1-2). Yet the government's spreadsheet jumbled all these claims together. If James ever impersonated the patient, all the patient's claims went on the spreadsheet. This is not a reasonable approach to restitution.

The government also does not deny that it included all claims involving Modifier 59 regardless of whether the use of Modifier 59 was proper or improper in the particular instance and regardless of whether it made a difference to the payment on the claim. (Br.54-55). Nor does the government deny that it made basic errors in its Modifier 59 spreadsheet, such as including claims paid by United Healthcare at a time when it had excluded Modifier 59 entirely. (Br.55).

The government tries to paint a phony scientific veneer over this botched analysis, claiming that it had self-identified an "error rate of 0.427%." (G.Br.66). The government just means that when it deduplicated the two spreadsheets after the first sentencing hearing it found that 0.427% of the claims were duplicates. Its "error rate" does not account for the underlying problem with its restitution application: the failure to distinguish between payments that resulted from the fraud and payments that did not.

The government also argues that its restitution figure was "conservative" in that it did not seek recovery for every aspect of James's fraud and self-limited the claims that it inputted to the spreadsheet. (G.Br.66-68). In other words, the government argues that it could have proven different facts in support of its restitution application, so the facts it did prove should not be scrutinized. This is a phony argument. The government could have sought restitution on a different theory. It didn't.

Finally, the government acknowledges that the restitution it obtained exceeded the restitution sought by Aetna and Cigna in their victim impact statements. (G.Br.72-73). The government's only response is to note that Aetna's in-house counsel stated at the sentencing that Aetna did not have access to the trial evidence when calculating its restitution request. (*Id.*). This makes no sense—these were their own records. Regardless, it is irrelevant. The trial presented a snapshot of James's alleged fraud. It would not have assisted the insurers in calculating restitution, a task that called for line-by-line analysis of thousands of claims, most of which were never mentioned at trial.

The district court's "basic failure at least to approximate the amount of the loss caused by the fraud" requires that the restitution order be vacated. *United States v. Rutkoske*, 506 F.3d 170, 180 (2d Cir. 2007).

VI. THE CASE SHOULD BE REMANDED TO A DIFFERENT JUDGE

The government is right that reassignment is a "serious request rarely made and rarely granted." (G.Br.74). It is warranted here. The district court's failed to take ordinary steps at trial to investigate the infiltration of extra-record matter. Faced with challenging issues at sentencing, the district court all but gave up on rendering reasoned decisions. And it entered a plainly illegal sentence driven by its view that James might secure early release. This is the rare case that should be reassigned on remand.

CONCLUSION

For the foregoing reasons, the judgment should be vacated and the case remanded to a different district judge for retrial or, at minimum, resentencing.

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Dated: November 14, 2024

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